MBf Insurans Sdn Bhd v Lembaga Penyatuan & Pemulihan Tanah Persekutuan (FELCRA)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-04–100 OF 2005
GOPAL SRI RAM, SURIYADI AND HASAN LAH JJCA
9 AUGUST 2007

Contract — Guarantee — Terms — Security guarantee with a shelf-life — 'Claims, if any, must be received on or before this date' — Whether claim on guarantee time-barred — Whether contrary to s 29 of Contracts Act 1950

By a security guarantee dated 18 August 1989 the appellant, an insurance company agreed to provide a guarantee that the sum of RM22,017 would be paid by way of a security deposit upon demand by the respondent, a statutory body who had executed a contract with the contractor subject to the terms and conditions of the security guarantee. The period of the guarantee was from 15 June 1989 to 14 June 1990. It was then extended for another year by way of an endorsement with the words: 'This guarantee will expire on 14 June 1991. Claims, if any, must be received on or before this date.' When the contractor did not complete its works under the contract awarded to it by the respondent, a demand was made on 21 June 1991 demanding that the sum of RM22,107 be paid to the respondent pursuant to the security guarantee. The appellant rejected the claim on the ground that the claim was made after the expiry of the guarantee. The magistrate court dismissed the respondent's action on the ground that the respondent's claim was out of time as the claim was made after the expiry of the said guarantee. The high court reversed the magistrate's decision. The learned high court judge was of the view that the shelf-life of the said guarantee which is embodied in the said endorsement was contrary to s 29 of the Contracts Act 1950 and therefore void as an attempt to contract out of the Limitation Act 1953. The appellant dissatisfied with the decision appealed to this court.

Held, dismissing the appeal:

(1) (per **Suriyadi JCA**) Due to the peculiarities of guarantee cases as in this appeal, in line with the reasoning of the case of *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141, time began to run against the appellant on the date when the contractor failed to keep up with its promise vis-à-vis the respondent. In the event the full force of s 29 of

A the Contract Act 1950 and s 6 of the Limitation Act 1953 were to take effect, the exact date of the breach would become irrelevant; as the breach had certainly taken place on or before 14 June 1991 and the last date being in and about 1997 (see para 39).

B (2) (per **Suriyadi JCA**) By the very nature of the agreement and their contents, the claim, enforcement of rights, demand of remedy, by whatever name one calls, had to be filed from the date the contractor breached the contract with the respondent, with the claim to be made by 14 June 1991. Whether the impugned endorsement was caught by s 29 of the Contracts Act 1950 or not, was a question of construction and a question of law, with the court being duty bound to arrive at its true construction (see para 41); *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat* [1979] 1 MLJ 23 followed.

D (3) (per **Suriyadi JCA**) Factually the respondent here had been boxed-in to file a claim within a specified period. Section 29 with its prohibitive and clear words, was an essential provision, an indication of the intent that it was mandatory, any departure of which must be frowned upon (*Bhindra's Interpretation of Statute* (7th Ed)) (see para 50).

E (4) (per **Gopal Sri Ram JCA**) 'Claims if any must be received on or before this date' must mean a demand by the respondent upon the appellant in respect of a breach occurring before 14 June 1991 (see para 7); *Perbadanan Kemajuan Negeri Selangor v Public Bank Bhd* [1980] 1 MLJ 172 followed.

F (5) (per **Gopal Sri Ram JCA**) Once one arrived at the conclusion that the guarantee was intended to cover an event occurring before 14 June 1991, the fact that the claim in respect of that event was made after 14 June 1991 could not prove fatal to the respondent. Were it otherwise, an absurdity would result and that was something the parties could not possibly have intended. The meaning considered as the true meaning of the endorsement, in the court's view, accorded with business commonsense (see para 12).

H (6) (per **Hasan Lah JCA**) The word 'claim' in the endorsement to the said guarantee must mean a demand by the respondent of the appellant in respect of a breach occurring before 14 June 1991 and the meaning of the endorsement in the said guarantee must be construed in the way in which a reasonable commercial person would construe it. In this case the claim was made in respect of the breach as stated in the respondent's letter dated 4 June 1991 to the contractor (see para 59).

[Bahasa Malaysia summary

Melalui satu jaminan sekuriti bertarikh 18 Ogos 1989 perayu, sebuah

syarikat insurans bersetuju memberikan satu jaminan bahawa jumlah RM22,017 akan dibayar melalui deposit jaminan apabila dituntut oleh responden, sebuah pertubuhan berkanun yang telah menandatangani satu kontrak dengan kontraktor, tertakluk kepada terma-terma dan syarat-syarat jaminan sekuriti tersebut. Tempoh untuk jaminan tersebut adalah dari 15 Jun 1989 ke 14 Jun 1990. Ia dilanjutkan untuk setahun lagi melalui pengindorsan dengan perkataan-perkataan: 'This guarantee will expire on 14 June 1991. Claims, if any, must be received on or before this date.' Apabila kontraktor tersebut tidak menyempurnakan kerja-kerjanya di bawah kontrak yang diawardkan kepadanya oleh responden, satu tuntutan dibuat pada 21 Jun 1991 menuntut bahawa jumlah RM22,107 dibayar kepada responden mengikut jaminan sekuriti tersebut. Perayu enggan membayar tuntutan tersebut atas alasan bahawa tuntutan tersebut dibuat selepas jaminan tersebut luput. Mahkamah majistret menolak tindakan responden atas alasan bahawa tuntutan responden adalah di luar masa oleh kerana tuntutan tersebut dibuat selepas jaminan tersebut luput. Mahkamah tinggi mengakas keputusan majistret tersebut. Hakim mahkamah tinggi berpendapat bahawa jangka hayat jaminan yang terdapat di pengindorsan tersebut adalah bertentangan dengan s 29 Akta Kontrak 1950 dan dengan itu terbatal sebagai satu percubaan untuk membentuk kontrak di luar Akta Had Masa 1953. Perayu tidak berpuas hati dengan keputusan tersebut merayu ke mahkamah ini.

Diputuskan, menolak rayuan tersebut:

(1) (oleh **Suriyadi HMR**) Disebabkan keluarbiasaan jaminan kes-kes seperti di dalam rayuan ini, sejajar dengan pendapat kes *Sia Siew Hong v Lim Gim Chian* [1995] 3 MLJ 141, masa mulai diambilkira terhadap perayu pada tarikh apabila kontraktor gagal menyempurnakan perjanjiannya vis-à-vis responden. Sekiranya kuasa penuh s 29 Akta Kontrak 1950 dan s 6 Akta Had Masa 1953 berkuat kuasa, tarikh sebenarnya perlanggaran tersebut adalah tidak relevan; oleh kerana perlanggaran tersebut setentunya berlangsung pada atau sebelum 14 Jun 1991 dan tarikh akhir lebih kurang pada 1997 (lihat perenggan 39).

(2) (oleh **Suriyadi HMR**) Mengikut sifat perjanjian dan kandungannya, tuntutan, perlaksanaan hak-hak, tuntutan untuk remedi, apa juga nama yang dipanggil, terpaksa difailkan dari tarikh kontraktor melanggar kontraknya dengan responden, dengan tuntutan dibuat sebelum 14 Jun 1991. Sama ada pengindorsan yang dipersoalkan itu terikat dengan s 29 Akta Kontrak 1950 atau tidak, adalah satu soalan tafsiran dan satu soalan undang-undang, mewajibkan mahkamah membuat keputusan mengikut tafsiran sebenarnya (lihat perenggan 41); *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat* [1979] 1 MLJ 23 diikut.

(3) (oleh **Suriyadi HMR**) Dari segi fakta responden di sini telah diberi had masa untuk menuntut dalam satu jangka masa. Seksyen 29 dengan perkataan-perkataan larangannya yang jelas, adalah peruntukkan penting, yang menunjukkan hasrat bahawa ia adalah mandatori, dan sebarang penyimpangan darinya tidak patut dibenarkan *(Bhindra's Interpretation of Statute* (7th Ed)) (lihat perenggan 50).

(4) (oleh **Gopal Sri Ram HMR**) 'Claims if any must be received on or before this date' semestinya bermaksud satu tuntutan oleh responden terhadap perayu berhubungan dengan satu perlanggaran yang berlaku sebelum 14 Jun 1991 (lihat perenggan 7); *Perbadanan Kemajuan Negeri Selangor v Public Bank Bhd* [1980] 1 MLJ 172 diikut.

(5) (oleh **Gopal Sri Ram HMR**) Apabila seseorang menyimpulkan bahawa jaminan tersebut bertujuan melindungi satu kejadian yang berlaku sebelum 14 Jun 1991, fakta bahawa tuntutan berhubungan dengan kejadian tersebut dibuat selepas 14 Jun 1991 tidak membawa mudarat kepada responden. Sekiranya tidak begitu, hasilnya adalah tidak munasabah dan ia adalah sesuatu di mana pihak-pihak tidak mungkin berhasrat. Maksud yang diberikan sebagai maksud sebenarnya pengindorsan tersebut, pada pandangan mahkamah mengikut akal budi perniagaan (lihat perenggan 12).

(6) (oleh **Hasan Lah HMR**) Perkataan 'claim' di pengindorsan dijaminan tersebut seharusnya bermaksud bahawa satu tuntutan oleh responden daripada perayu berhubungan dengan perlanggaran yang berlaku sebelum 14 Jun 1991 dan maksud pengindorsan di jaminan tersebut harus ditafsirkan sebagaimana seseorang ahli perniagaan yang munasabah akan mentafsirkannya. Dalam kes ini tuntutan tersebut dibuat berhubungan dengan satu perlanggaran yang dinyatakan di dalam surat responden bertarikh 4 Jun 1991 kepada kontraktor (lihat perenggan 59).]

Notes

For cases on terms of guarantee, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4059–4060.

Cases referred to

Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat [1979] 1 MLJ 23 (folld)

Caledonian Railway Co v North British Railway Co (1881) 6 App Cas 114 (refd)

Corporation Royal Exchange v Teck Guan (1912) 2 FMSLR 92. (refd)

Development Bank of Singapore Ltd v Eng Keong Realty Pte Ltd [1990] 3 MLJ 89 (refd)

G Percy Trentham Ltd v Archital Luxfer Ltd [1993] 1 Lloyd's Rep 25 (refd)

Grey v Pearson (1875) 6 HLC 61 (refd)
Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 230 (refd)
J & Wong Logging Contractor v Arab Malaysian Eagle Assurance Bhd [1993] 1 MLJ 240 (refd)
Lembaga Pelabuhan Johor v The Pacific Bank Bhd [1998] 5 MLJ 323 (refd)
Letang Cooper [1965] 1 QB 232 (refd)
Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749 (refd)
Mok Hin Wah v United Malayan Banking Corp Bhd [1987] 2 MLJ 610 (refd)
New Zealand Insurance Co Ltd v Ong Choon Lin (t/a Syarikat Federal Motor Trading) [1992] 1 MLJ 185 (refd)
Perbadanan Kemajuan Negeri Selangor v Public Bank Bhd [1980] 1 MLJ 172 (folld)
R v Peters (1886) 16 QBD 636 (refd)
Robertson v French (1803) 4 East 130 (refd)
Sarawak Electricity Supply Corp v MS Shipping Sdn Bhd [2000] 5 MLJ 721 (refd)
Sia Siew Hong & Ors v Lim Gim Chian & Anor [1995] 3 MLJ 141 (refd)
State of Madhya Pradesh v Orient Paper Mills Ltd AIR 1977 SC 687 (refd)
Union of India v M/s DN Revri & Co AIR 1976 SC 2257 (refd)
United Malayan Banking Corp Bhd v Datin Theresah bt Abdullah [1995] 1 AMR 304 (refd)
Watson v Phipps [1985] 60 ALJR 1 (refd)
Wickman Machine Tools Sales v L Schuler AG [1974] AC 235 (refd)

Legislation referred to
Arbitration Act 1952 s 28
Contract Act of 1950 ss 9, 29
Limitation Act 1953 s 6
Rules of the Subordinate Court 1980 O 26A r 1

Appeal from: Civil Appeal No R1–11–313 of 2001 (High Court, Kuala Lumpur)

Tunku Farik bin Tunku Ismail (Azim, Tunku Farik & Chong) for the appellant.
Zainur Zakaria (Zainur Zakaria & Co) for the respondent.

Gopal Sri Ram JCA:

[1] I too would dismiss this appeal. But for reasons different from those given by my learned brother Suriyadi in his judgment. The appellant must, in my opinion, fail on the point of construction of the relevant endorsement which reads as follows:

A This guarantee will expire on 14 June 1991. Claims, if any, must be received on or before this date.

B **[2]** In my judgment, what the first sentence in this endorsement means is this. The appellant will be liable on the guarantee until 14 June 1991. If anything happens after that date no liability attaches. Next, what does the second sentence mean? It may mean one of three things. It may mean that the respondent must file its action against the appellant before 14 June 1991. Or it may mean that if there has been any breach by the contractor during the period expiring 14 June 1991, then the guarantee must be called upon on or before 14 June 1991. Or it may mean that the respondent may make a demand in respect of an event that occurred during the life of the guarantee and such demand may be made upon the appellant even after 14 June 1991.

D **[3]** I do not think that the first meaning is correct. Assume that the event giving rise to liability occurred on 13 June 1991. It would mean that the respondent has only a day to institute proceedings. Or what if the respondent becomes aware of the event on 15 June 1991. It would be impossible then for the respondent to commence an action before 14 June 1991 and for that reason his claim would be barred. The first meaning produces an absurd result and therefore cannot possibly be the meaning intended. See *Wickman Machine Tools Sales v L Schuler AG* [1974] AC 235, per Lord Simon of Glaisdale: 'On the other hand, to read 'condition' in cl 7(b) in what I regard as its primary sense as a term of art produces, as my noble and learned friend, Lord Reid, has shown, such absurd results that this cannot be the meaning to be ascribed to it, provided that it is reasonably capable of some other meaning.' See also, *Watson v Phipps* [1985] 60 ALJR 1, per Lord Brightman: 'The function of a court of construction is to ascertain what the parties meant by the words which they have used. For this purpose the grammatical and ordinary sense of the words is to be adhered to, unless they lead to some absurdity or to some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further: see the speech of Lord Wensleydale in *Grey v Pearson* (1875) 6 HLC 61 at p 106, ([1875] 10 ER 1216 (HL)) repeated by Lord Blackburn in *Caledonian Railway Co v North British Railway Co* (1881) 6 App Cas 114 at p 131.'

I **[4]** Take the second meaning. Again test it against the same assumed facts. And again it produces an absurd result. How could the respondent make a claim in respect of an event that occurred before 14 June 1991 of which it had notice only after that date? So the second meaning cannot hold.

[5] Now take the third possible meaning. If the event occurred even on 13 June 1991, the appellant would remain liable and notice of it may be given after that date. I am hence inclined to the view that it is the third meaning that is correct.

[6] There is an alternate route by which I am equally inclined to arrive at the same conclusion. It is this. Since the material part of the endorsement is capable of having more than one meaning, it must be treated as being ambiguous. And since it is the appellant who seeks to rely on the terms of the ambiguous endorsement to defeat the respondent's claim, its terms must be construed contra proferentum against it and be given the third meaning I have ascribed to it. As Abdul Malik Ishak J said in *Lembaga Pelabuhan Johor v The Pacific Bank Bhd* [1998] 5 MLJ 323 (at p 334):

> .. if the words in the guarantee are ambiguous, the guarantee should be construed strictly against the guarantor for the simple reason that the guarantor is the maker of the instrument (*Mason v Pritchard* (1810) 12 East 227; *Mayer v Issac* (1840) 6 M & W 605; and *Merle v Wells* (1810) 2 Camp 413).

[7] That brings me to the meaning of the word 'claim' in the second sentence. The intermediate appellate judge thought that it meant the filing of a suit. But with respect, I do not agree. 'Claims if any must be received on or before this date' must mean a demand by the respondent upon the appellant in respect of a breach occurring before 14 June 1991. This is consistent with the third interpretation of the endorsement. I draw support for my view from the judgment of Mohamed Azmi J (as he then was) in *Perbadanan Kemajuan Negeri Selangor v Public Bank Bhd* [1980] 1 MLJ 172 where he held that the word 'claim' which appears in the endorsement to the guarantee in the present case (at p 176):

> cannot mean filing a writ, as under Limitation Ordinance.. The word 'claim' must necessarily mean a demand or claim by the creditor from the surety.

[8] Needless to say, I am most conscious of the danger in a construction exercise for a court to attempt to determine the objective intention of parties gathered from words they used in their contract and from the relevant background by reference to what different parties to a wholly different contract may have meant by the use of the same or similar words. As Krishna Iyer J said in *State of Madhya Pradesh v Orient Paper Mills Ltd* AIR 1977 SC 687:

> The true import of the document may be gathered from its terms, not from rulings on other documents. There is a serious limitation on the service of case law in this area. It depends firstly on the actual issue in each case and the angle of vision adopted and secondly on the clauses, purposes and surrounding circumstances of each transaction.

A Yet, having carefully considered the endorsement in the context of the whole document and taking into account the special features of this case, I am moved to the conclusion that the word 'claim' means what Mohamed Azmi J said it meant in *Perbadanan Kemajuan Negeri Selangor v Public Bank Bhd* .

B **[9]** It follows from what I have said thus far that the respondent was not out of time, contractually speaking, when it made its claim on 21 June 1991.

[10] In arriving at my conclusion I have adopted the approach commended C to me by the leading cases on the subject of contractual interpretation. First, that the yardstick to be applied is 'the reasonable expectations of sensible businessmen' (see *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25, per Steyn LJ. Second, that a narrow and pedantic approach such as that suggested by the appellant is to be avoided. As Bhagwati J said in *Union* D *of India v M/s DN Revri & Co* AIR 1976 SC 2257:

> It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other documents. The meaning of such contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted E by a narrow, pedantic and legalistic interpretation.

[11] A similar approach as that suggested by Bhagwati J was adopted in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, F where Lord Steyn said:

> In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are G therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.

H **[12]** Once you arrive at the conclusion that the guarantee was intended to cover an event occurring before 14 June 1991, the fact that the claim in respect of that event was made after 14 June 1991 cannot prove fatal to the respondent. Were it otherwise, an absurdity would, as I have already said, result and that is something the parties cannot possibly have intended. I The meaning which I consider is the true meaning of the endorsement, in my view, accords with business commonsense.

[13] I join in the orders my learned brother Suriyadi proposes to make in this appeal.

Suriyadi JCA:

[14] This is one of the old cases, filed way back on 15 September 1993, where by now the costs of the proceedings would probably have exceeded the sum claimed. The facts revealed that the respondent had filed this case at the Magistrate's Court at Kuala Lumpur, to recover a paltry sum of RM22,017. It then filed an application under O 26A r 1 of the Rules of the Subordinate Court 1980 for a summary judgment. On 14 October 1994, the learned magistrate allowed the respondent's application and entered a summary judgment against the appellant for the abovementioned sum plus interest and costs.

[15] The appellant, being dissatisfied with the decision of the magistrate had appealed to the Appellate and Special Powers Division of the High Court. On 4 May 1995, the learned High Court judge had dismissed the appeal and affirmed the decision of the lower court. The appellant still being dissatisfied applied to the Court of Appeal for leave to appeal. On 10 July 1995, leave to appeal was granted. Subsequently after having heard the appeal proper the Court of Appeal had allowed the appeal and set aside the learned magistrate's order. The matter was then remitted to the magistrate's court to be set down for trial.

[16] On 27 November 2001, the learned magistrate dismissed the respondent's claim with costs. At that stage, parties had agreed that there was no dispute of facts, and parties had merely wanted the learned magistrate to decide whether the appellant was liable to pay the plaintiff's claims pursuant to two guarantees. The learned magistrate had dismissed the claim on the premise that it was time-barred by virtue of the provisions of those guarantees agreed by both parties.

[17] An appeal thereafter was filed by the respondent at the Appellate and Special Powers Division of the High Court. This time it was successful whereupon the High Court had reversed the decision of the learned magistrate. In a gist the learned High Court judge had stated that the time limited of filing any claim pursuant to the two guarantees had contravened s 29 of the Contract Act of 1950. Being dissatisfied the current appellant had filed this appeal.

FACTS OF THE APPEAL

[18] The facts of the current case are as follows. On 6 May 1989, the respondent, a statutory body had executed a contract with Haza Enterprise (contractor) with the latter to undertake and complete agricultural works at

A a 195 acres palm oil estate at Felcra Bukit Panjang, Setiu, Trengganu. The appellant is an insurance company. By a Security Guarantee number CZE000010B dated 18 August 1989 ('the security guarantee'), the appellant had agreed to provide a guarantee that a sum of RM22,017 will be paid by way of a security deposit upon demand by the respondent, subject to the B terms and conditions of that Security Guarantee. The period of the guarantee was from 15 June 1989 till 14 June 1990. The purpose of the Security Guarantee was to provide cover for the due performance by Haza Enterprise ('the contractor') pursuant to the said contract for a project known as, 'Kerja Pertanian Am Kelapa Sawit (195 Hektar) Di FELCRA Bukit Panjang, Setiu, C Terengganu' and identified as No PA 177/89 from the period of 15 June 1989 till 14 June 1990. Clause A of the Security Guarantee provides that:

> The said sum of RM22,017 shall be paid by us forthwith on demand by you in writing without your having to assign any reason whatsoever for such demand.

D

[19] Clause C of the Security Guarantee provides that:

> This guarantee is effective from 15 June 1989 to 14 June 1990.

E

[20] Clause D of the security guarantee reads:

> The giving of time to the said contractor or the neglect or forbearance by you (the authority) in requiring or enforcing payment of the said sum of RM 22,017 … shall not … release or absolve us from our liability under this guarantee.

F

[21] By an endorsement, number EEC200023 dated 5 September 1990 to the Security Guarantee ('the endorsement'), the appellant agreed to extend the period of guarantee under the security guarantee for another year, ie from G 15 June 1990 till 14 June 1991, subject to the same terms and conditions. The endorsement further stipulated that:

> This guarantee will expire on 14 June 1991. Claim, if any, must be received on or before this date.

H

[22] By reason of the contractor failing to perform and complete the works required of them under the said contract, notices were issued to the said contractor on 4 June 1991. The respondent then later wrote a letter of demand to the appellant on 21 June 1991, ie seven days after 14 June 1991 I (the date of expiry of the security guarantee), claiming the security deposit because of that failed work. As the respondent's claim in writing was only made after the expiry of the guarantee, ie after the shelf-life of the security guarantee, and the appellant believing that it no longer owed any obligation towards the respondent, had accordingly informed the respondent on 11 July

1991 of its want of liability. This early reply led to the commencement of this action which eventually culminated in this appeal.

[23] To simplify matters I have reduced the facts as follows:

- the guarantee was dated 18 August 1989;
- period covered was from 15 June 1989–14 June 1990;
- period of the tender project was from 15 June 1989–14 June 1990;
- extension given from 15 June 1990-14 June 1991;
- provisions state claim to be made before 14 June 1991;
- actual claim made on 21 June 1991 (seven days late);
- claim rejected on 11 July 1991.

[24] The appellant had submitted that the respondent had six years to file a suit but subject to a claim having been made within the validity of the security guarantee. As the respondent had failed to comply with the provisions, in relation to the filing of the claim within the shelf-life of the security guarantee, the suit thus must fail, as it had failed to establish a cause of action.

[25] In support of its position the appellant had started off by alluding to the Supreme Court case of *Mok Hin Wah v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 where Salleh Abas LP at p 611 had stated 'Since bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but make the demand a condition precedent to suing the guarantor' (see also *United Malayan Banking Corp Bhd v Datin Theresah bt Abdullah* [1995] 1 AMR 304). In *Development Bank of Singapore Ltd v Eng Keong Realty Pte Ltd* [1990] 3 MLJ 89 the court had held (at p 92):

> Since no valid demand had been made under the guarantee before the expiry date on 14 April 1988, the first defendants were no longer entitled to any payment under the guarantee.

[26] Learned counsel for the appellant had ventilated that as the present case concerned the shelf-life of a Security Guarantee parties thus were entitled to prescribe a shelf-life to it. It had adverted to O'Donovan, *The Modern Contract of Guarantee* at p 472 with the relevant portion reading:

> Where the guarantee itself determines at a specified date and the guarantor's liability arises upon demand, it will also be important that demand be made by the creditor before the relevant date so as to avoid any argument that the cause of action did not arise against the guarantor during the period of guarantee.

[27] Agreeably there is no shortage of authorities which suggest that guarantees may be limited in time or in amount, or both (Andrews and Millet, *Law of Guarantees* (3rd Ed) p 93; Low Kee Yang in *The Law of Guarantees in Singapore and Malaysia* p 147). Poh Chu Chai on *Law of Pledges, Guarantees and Letters of Credit* (5th Ed) at p 231 even had authored:

> A guarantee becomes operative only after the terms of the guarantee have been strictly complied with by a creditor. If there is any departure from the terms of the guarantee, liability under the guarantee does not arise …When it is expressly provided in a guarantee that a creditor is to make a demand for payment on the guarantor, time does not run against the creditor until a demand for payment is made. In *Bradford Old Bank Ltd v Sutcliffe*, the English Court of Appeal decided, inter alia, that when a demand for payment was made a condition precedent to a guarantor's liability, time did not run against a creditor until a demand for payment had been made by the creditor.

[28] The submission of the respondent before us was not dissimilar to the approach of the learned High Court judge. It had contended that it was entitled to enforce its rights within six years from the time the breach by the said contractor took place. This period could not be limited by the conditions imposed by the appellant, that a claim to enforce such rights must be made within a shorter period of time, the last day being 14 June 1991.

[29] To appreciate the matter at hand it is necessary to scrutinize the endorsement vis-à-vis s 29 of the Contract Act 1950. The endorsement reads:

> This guarantee will expire on 14 June 1991. Claim, if any, must be received on or before this date.

[30] This endorsement is crystal clear, viz. that:

(i) the guarantee expires on 14 June 1991;

(ii) it relates to a claim;

(iii) any claim made must be received; and

(iv) such claim must be received on or before 14 June 1991.

[31] The effect is that any claim filed after 14 June 1991 will not be entertained by the appellant. In a gist the appellant is not responsible for any

claim if received after that agreed date. Without the existence of a right of claim the respondent will therefore be devoid of any cause of action. Due to the nature of this restricting endorsement a few questions may flow from it, namely:

(i) if the breach occurs on 13 June 1991 when then must the claim be made;

(ii) does it not make compliance with the requirements of the endorsement therefore impractical and absurd;

(iii) does it not restrict the time within which it may enforce its rights, as demanded by the agreement;

(iv) is it not an absolute denial of the respondent's right in the contract if the breach of the contract were to occur on 13 June 1991;

(v) is it not that by restricting or denying the rights of the respondent, as in (iii) and (iv), it tantamount to restricting the respondent from enforcing its rights by the usual legal proceedings in the courts; and

(vi) does this endorsement not run counter to s 29 of the Contract Act 1950?

[32] Section 29 of the Contract Act 1950 reads:

> Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

[33] In the accepted sense it is understood that rights are either legal or equitable, with the former being a person seeking to enforce a right that has a legal title and a remedy at law, whilst under equitable it is enforceable in equity. I had sought the assistance of *Black's Law Dictionary* (6th Ed) for clarification as there is a dearth of definition of that word 'rights' in the relevant Act. But then again there is nothing wrong in resorting to dictionaries in certain circumstances. In *R v Peters* (1886) 16 QBD 636 Lord Coleridge CJ had occasion to state:

> I am quite aware that dictionaries are not to be taken as authoritative exponents of the meanings of words used in Acts of Parliament, but it is a well-known rule of courts of law that words are to be taken to be used in their ordinary sense, and we are sent for instruction to these books.

[34] I now return to the main stream and continue the prognosis. Pertinent to the matter of the respondent's rights, as envisaged by s 29 of the Contracts Act 1950, for purposes of this appeal, it is inevitable that it has to be

A inextricably intertwined with the claim of the respondent pursuant to the Security Guarantee. The way I see it, at the stage of filing the suit, the relevant question that begs to be answered is, did the respondent have a valid 'cause of action' then.

B **[35]** Lord Justice Diplock in *Letang Cooper* [1965] 1 QB 232 (pp 242–243), had occasion to state that 'cause of action' may be defined as a factual situation the existence of which entitled one person to obtain from the court a remedy against another. Abdul Hamid Ag LP in *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230, picking up from there, when C discussing the above definition added that the definition merely fortified his view that a relief or remedy was ancillary to and not separable from a cause of action. Syed Agil Barakbah SJ likewise had agreed with that view. In *New Zealand Insurance Co Ltd v Ong Choon Lin (t/a Syarikat Federal Motor Trading)* [1992] 1 MLJ 185, the Supreme Court after considering the above D opinions had opined that there was no distinction between a right and its remedy in Malaysia. They were inseparable. The nature of the remedy in relation to the cause of action was nothing more than the right to sue.

E **[36]** Flowing from the above, the definable 'factual situation' must take centre stage in our prognosis. For purposes of the current appeal, the 'factual situation' will be the agreed fact that the respondent had a right of claim in law or in fact against the appellant, when the contractor had breached his contract with the respondent. With the respondent being clothed by that set of facts, the moment the contractor breached his contract, a cause of action F had arisen, which entitled the respondent to obtain a remedy against the appellant in court.

[37] With the limitation issue being the backbone of the appellant's defence there is thus a need to trace when the cause of action began. G Following the argument of the appellant and due to the late claim by seven days (filed on 21 June 1991) it follows that the impugned 'cause of action' had been extinguished; if not for the endorsement the respondent would have had years to spare. It cannot be overly emphasized that the 'when' will H eventually take a back seat when the facts, law and reasons steadily unfold.

[38] I move on. My learned brother Gopal Sri Ram JCA in *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141 at p 151 had occasion to state that 'As a general rule, in actions for breach of contract, time under I the Limitation Act 1953 begins to run from the date of its breach.' That case concerned an indemnity despite being termed a guarantee, with the relevant issue not too dissimilar to the current case.

[39] Due to the peculiarities of guarantee cases as in this appeal, in line with the reasoning of the above case of *Sia Siew Hong v Lim Gim Chian*, time began to run against the appellant on the date when the contractor failed to keep up with its promise vis-à-vis the respondent. In the event the full force of s 29 of the Contract Act 1950 and s 6 of the Limitation Act 1953 were to take effect, the exact date of the breach would become irrelevant; as the breach had certainly taken place on or before 14 June 1991 and the last date being in and about 1997.

[40] What is more pertinent is the issue of whether the restrictive bar of filing a claim on or before 14 June 1991 had contravened s 29 of the Contract Act or not. The words of the endorsement here are clear and ordinary and could be construed in their grammatical and ordinary sense, an approach which is not against the golden rule of construction. Lord Ellenborough CJ in *Robertson v French* (1803) 4 East 130 had expressed the principle thus:

> It (namely, a written instrument) is to be construed according to its sense and meaning as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain ordinary and popular sense, unless they have generally in respect to the subject matter, as by the known usage of a trade, or the like, acquired a peculiar sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the intention of the parties to that contract, be understood in some other special and peculiar senses (emphasis mine).

[41] By the very nature of the agreement and their contents, the claim, enforcement of rights, demand of remedy, by whatever name one calls, had to be filed from the date the contractor breached the contact with the respondent, with the claim to be made by 14 June 1991. Whether the impugned endorsement is caught by s 29 of the Contracts Act 1950 or not, is a question of construction and a question of law, with the court being duty bound to arrive at its true construction (*Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat* [1979] 1 MLJ 23).

[42] In *The law of Contract in Malaysia and Singapore* by Visu Sinnadurai (1979) Oxford University Press, the prolific writer had occasion to reproduce the case of *Corporation Royal Exchange v Teck Guan* (1912) 2 FMSLR 92. The facts of the latter case are as follows:

> The plaintiff's shop was situated in Ampang and had been insured with the defendant company. It was burnt down on 25 November 1911 with the shop and contents totally destroyed. On 8th December the plaintiff furnished defendants with particulars of his claim. On 5 January 1912, the defendants repudiated liability. The plaintiff filed his suit on 6 May 1912. The insurance policy contained a clause: 'If the claim be made and rejected and an action or suit be not commenced within three months after such rejection … all benefit under this

policy shall be forfeited.' It was held by Sercombe-Smith CJC, that this clause was void under section 28 (equivalent to s 29 of the Contract Act) of the Contract Enactment.

[43] Despite some initial confusion, about the actual status of that court, in that it was a court of first instance rather than a Court of Appeal, this case was subsequently endorsed by *New Zealand Insurance Co Ltd v Ong Choon Lin (t/a Syarikat Federal Motor Trading)* [1992] 1 MLJ 185). This case concerned the rights of an insured under a fire insurance policy. The facts are as follows:

> Pursuant to a fire insurance policy dated 3 June 1980 the appellant had agreed to indemnify the respondent against loss and damage occasioned by fire to the property situated at the respondent's premises. The policy was initially valid for the period from 21 May 1980 to 1 May 1981 and was then renewed from 1 May 1981 to 21 May 1982. There was a stipulation in the policy that the respondent undertook during the currency of the policy to hold a licence as required by the municipal council and to comply with its conditions and requirements. When the policy came into effect there was no municipal by-law requiring the respondent's business to be licensed. Later certain municipal by-laws came into force with effect from 1 January 1981 to effect of which, inter alia, was to require the respondent's business to be licensed. The provision regarding the licence was not brought to the attention of the respondent at the time of the renewal of the policy. On 29 November 1981 during the renewed term a fire occurred on the premises in consequence of which the respondent submitted a claim to the appellant. The claim was rejected. The respondent filed a suit for the money claimed 17 months after the fire and after the expiry of the stipulated 12 month period of the policy. At the trial, among the defences raised were: (1) that the claim was barred by reasons of the commencement of the action after the expiry of the 12 month period stipulated in the policy; and (2) that, in not obtaining the licence, the respondent had acted in breach of the condition regarding the licence. The trial judge gave judgment in favour of the respondent for the agreed sum with costs.
>
> The appellant appealed to the Supreme Court against the decision. In dismissing the appeal, the Supreme Court had held that the condition that the action be commenced within a 12 month period from the date of the occurrence of the loss or damage was void by virtue of the imperative words of s 29 of the Contracts Act 1950 as it clearly limited the time within which the respondent could enforce his right under s 6(1)(a) of the Limitation Act 1953.

[44] Ian Chin J in *Sarawak Electricity Supply Corp v MS Shipping Sdn Bhd* [2000] 5 MLJ 721 had occasion again to discuss a clause whether it had contravened s 29 of the Contract Act 1950. The plaintiff had shipped a consignment of cargo on board the vessel owned by the defendant. The vessel sunk and the plaintiff obtained payment for the lost cargo from the insurer. By right of subrogation the insurer commenced action against the defendant in the name of the plaintiff. The defendant contended that: (i) the claim was

barred because of the plaintiff's failure to give to the defendant written notice within 60 days from the due date of delivery of the cargo as required by cl 9 of the contract. The plaintiff had contended inter alia that cl 9 was void under s 9 of the Contracts Act 1950. Even though Ian Chin J had referred to the above case of *New Zealand Insurance Co Ltd v Qng Choon Lin (t/a Syarikat Federal Motor Trading)* [1992] 1 MLJ 185 (SC) in the course of his deliberation, in view of the special circumstances of the case, he had decided that the action indeed was time-barred. In a nutshell the plaintiff had behaved rather badly and unconscionably, and in the interest of justice, the court had eventually dismissed the claim with costs.

[45] In the current appeal, be it at the magistrate's court or the High Court, s 29 of the Contract Act 1950 was agreed by all parties to be the central issue. The differentiation between this appeal and the above case of *Sarawak Electricity Supply Corp v MS Shipping Sdn Bhd* therefore is quite obvious. Surely if the issue for consideration were similar to the current case the court in the above case would have decided differently.

[46] In *J & Wong Logging Contractor v Arab Malaysian Eagle Assurance Bhd* [1993] 1 MLJ 240 the plaintiffs had taken out an equipment insurance policy dated 22 November 1989 to insure two units of tractors with the defendants. During the currency of the policy on 26 March 1990, one of the tractors was damaged. The plaintiffs lodged a claim under the policy but the defendants rejected the claim contending, inter alia, that the accident did not come within the terms of the policy. Nevertheless, negotiations commenced between the parties. On 11 April 1991, the plaintiffs filed a summons in the sessions' court claiming a sum of RM64,675.69 for loss or damage. On 24 September 1991, the plaintiffs wrote to the defendants asking whether the latter would agree to waive the condition requiring the dispute to be referred to arbitration. The defendants replied by letter dated 30 May 1991 offering a specific amount. This offer appeared not to have been accepted but the negotiations on quantum apparently continued unabated until late October or early November 1991. The defendants took the stand that since the plaintiffs had failed to resort to arbitration in compliance with cl 11 of the policy their right to arbitration was therefore time barred.

[47] Clause 11 was stipulated in the following terms:

> All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in differences or if they cannot agree upon a single arbitrator to the decision of two arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the arbitrators do not agree of an umpire appointed in writing by the arbitrators before entering upon the

A reference. The umpire shall sit with the arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the company.

If the company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such
B disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.

C **[48]** The plaintiffs filed an application for leave to enlarge time to refer their claim to arbitration pursuant to s 28 of the Arbitration Act 1952. At the outset of the hearing, the plaintiffs raised a preliminary issue relating to the question of whether the court has jurisdiction to consider the application in view of the decision of the Supreme Court in *New Zealand Insurance Co Ltd v Ong Choon Lin* [1992] 1 MLJ 185.
D

[49] The court had dismissed the application. The court had held that the consequential effect of cl 11 of the insurance policy was to limit the time within which the plaintiffs were allowed to enforce their rights in a court of
E law. It was therefore void by reason of the provisions of s 29 of the Contracts Act 1950 because it had the effect of restricting the plaintiffs' statutory period for bringing an action under s 6 of the Limitation Act 1953. In the premises the court could not entertain the merits of the application.

F CONCLUSION

[50] Factually the respondent here had been boxed-in to file a claim within a specified period. Section 29 with its prohibitive and clear words, is an essential provision, an indication of the intent that it is mandatory, any
G departure of which must be frowned upon (*Bhindra's Interpretation of Statute* (7th Ed)). Having considered the facts and law, I reject the argument canvassed by the appellant that the respondent must first file the claim on or before 14 June 1991, an argument that had totally disregarded the provisions of s 29 of the Contract Act 1950 and s 6 of the Limitation Act 1953.

H

[51] That being so I am satisfied that the learned High Court judge had not erred in law and fact when concluding that the endorsement had contravened s 29 of the Contract Act 1950. I therefore rule the endorsement as being void. With the restriction lifted, what with the claim being filed not
I outside the limitation period ie still within the six year period as provided for under the Limitation Act 1953, the claim is thus good.

[52] I therefore dismiss the appeal with costs. The decision of the High Court accordingly is affirmed.

Hasan Lah JCA:

[53] By a security guarantee dated 18 August 1989 the appellant agreed to provide a guarantee that the sum of RM22,017 would be paid by way of a security deposit upon demand by the respondent, subject to the terms and conditions of the security guarantee. The period of the guarantee was from 15 June 1989 to 14 June 1990. It was then extended for another year by way of an endorsement made on 5 September 1990 as follows:

> This guarantee will expire on 14 June 1991. Claims if any must be received on or before this date.

[54] When the contractor, Haza Enterprise, did not complete its works under the contract awarded to it by the respondent the respondent wrote a letter to the appellant on 21 June 1991 demanding that the sum of RM22,107 be paid to the respondent pursuant to the security guarantee. The appellant rejected the claim on the ground that the claim was made after the expiry of the guarantee.

[55] Arising from that the respondent filed an action in the magistrate court to claim for the said sum against the appellant. The magistrate court dismissed the respondent's action on the ground that the respondent's claim was out of time as the claim was made after the expiry of the said guarantee. The respondent appealed against the decision to the High Court and the High Court reversed the magistrate's decision. The learned High Court judge was of the view that the shelf-life of the said guarantee which is embodied in the said endorsement was contrary to s 29 of the Contracts Act 1950 and therefore void as an attempt to contract out of the Limitation Act 1953. In coming to that conclusion the learned High Court judge relied on the judgment of the Supreme Court in *New Zealand Insurance Co Ltd v Ong Choon Lin* This time it was the appellant's turn to be dissatisfied with the decision. It appealed against the said decision of the learned High Court judge to this court.

[56] It was the contention of the learned counsel for the appellant that the learned High Court judge had erred in law and fact in holding that the shelf-life of the said guarantee was contrary to s 29 of the Contracts Act 1950. According to the learned counsel for the appellant the case of *New Zealand Insurance Co Ltd v Ong Choon Lin* is not in pari materia with the facts of the present case as that case concerns with the rights of an insured under a fire insurance policy whereas the present case relates to a shelf-life of a security guarantee and it is trite that parties are entitled to prescribe a shelf-life to guarantee and performance bonds. He also submitted that the learned High

Court Judge failed to take cognisance that in the law of guarantee the guarantee may expressly provide that it is to expire at a specified date or after a specified date. In support of that he referred to the passages in the following books:

(a) O' Donovan, *The Modern Contract of Guarantee*;

(b) Andrews and Millet, *Law of Guarantees* (3rd Ed);

(c) Low Kee Yang, *The Law of Guarantees in Singapore and Malaysia*; and

(d) Poh Chu Chai on *Law of Pledges, Guarantees and Letters of Credit* (5th Ed).

[57] It is also the contention of the learned counsel for the appellant that this case has nothing to do with limitation. It only concerns with the shelf-life of the said guarantee. What it means here is that if the creditor fails to demand within the shelf-life he does not have a cause of action against the guarantor.

[58] In reply to that the learned counsel for the respondent submitted that the respondent's claim is not time barred and the relevant provision of the said guarantee if so construed as limiting the time within which the respondent is entitled to enforce it's rights is void to that extent. In support of that he relied on s 29 of the Contracts Act 1950 and the case of *New Zealand Insurance Co Ltd v Ong Choon Lin*. According to the learned counsel the liability and obligation of the appellant arose on 4 June 1991 when a notice was sent to the contractor informing the contractor that it was in breach of the contract as it did not perform its works in accordance with the schedule stated in the agreement. As such the respondent's cause of action against the appellant accrued on 4 June.1991 and the respondent had six years within which to enforce the claim. By requiring the respondent to make the claim not later than 14 June 1991 the appellant is limiting the time of six years within which the respondent is allowed to enforce such claim and to that extent the condition imposed by the said guarantee is void under s 29 of the Contracts Act 1950. The learned counsel for the respondent also submitted that the argument made by the learned counsel for the appellant in this case had also been argued in *New Zealand Insurance Co Ltd v Ong Choon Lin* and it was rejected by the Supreme Court.

[59] I have had the benefit of reading the judgments in draft of my learned brothers, Gopal Sri Ram JCA and Suriyadi Halim Omar JCA. With respect, I fully agree with the view expressed by my learned brother Gopal Sri Ram JCA. I agree that the word 'claim' in the endorsement to the said guarantee must mean a demand by the respondent of the appellant in respect of a breach occurring before 14 June 1991 and the meaning of the endorsement

in the said guarantee must be construed in the way in which a reasonable commercial person would construe it. In this case the claim was made in respect of the breach as stated in the respondent's letter dated 4 June 1991 to the contractor.

[60] I agree for the reasons stated by my learned brother Gopal Sri Ram JCA that the appeal should be dismissed with costs.

Reported by Sally Kee